FILE COPY

AUG 16 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY
Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

(The Jurisdiction Included.)

ARTHUR B. HYMAN,
KARL D. LOOS,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary of the matter involved	2
Reasons relied on for the allowance of the writ	6
Prayer for the writ	6
Brief in support of petition for writ of certiorari	8
I. The opinions of the Courts below	8
II. Jurisdiction	8
III. Statement of the case	9
IV. Specification of errors	9
V. Argument	9
The Circuit Court of Appeals erred as a matter of law in interpreting the decision in Clarke v. Haberle Crystal Springs Brewing Company, 280 U. S. 384 to mean that no allowance for the obsolescence of tangible property is permissible under Sec. 234 (a) (4) (7) of the Revenue Act of 1918	9
Conclusion	11

TABLE OF CASES CITED.

Clarke v. Haberle Crystal Springs Brewing Co., 280 U. S. 384	2, 5, 6, 9, 10
Dowling, Appeal of Mary, 6 B. T. A. 976	10
George Wiedemann Brewing Co., Appeal of, 9 B. T. A. 792	10
Hellmich v. Hellman, 276 U. S. 233	9
Lucas v. Alexander, 279 U. S. 573	9
Lucas v. Industrial Alcohol Co. Inc., No. 109, Oct. Term 1930; 38 F. (2d) 718	3, 6, 11

Page

Lucas v. Niagara Falls Brewing Co., No. 61, Oct. Term 1930; 38 F. (2d) 217 .....2, 3, 5, 6, 10, 11
Manhattan Brewing Co., Appeal of, 6 B. T. A. 952 10
Red Wing Malting Co. v. Willcutts, 15 F. (2d) 626; 273 U. S. 763 10
Renziehausen v. Commissioner, 31 F. (2d) 675; 280 U. S. 387 10
Star Brewing Co., Appeal of, 7 B. T. A. 377 10

TABLE OF STATUTES CITED.

Revenue Act of 1918, Sec. 234 (a) (4) (7), C. 18, 40 Stat. 1077 .....3, 9, 10
Judicial Code, Sec. 240, as amended by Act of Feb. 13, 1925, C. 229, 43 Stat. 938; U. S. C. Title 28, Sec. 347 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

V. LOEWERS GAMBRINUS BREWERY COMPANY
Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

(The Jurisdiction Included.)

May it Please the Court:

The petition of V. Loewers Gambrinus Brewery Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was a suit to recover federal income and profits taxes paid by petitioner for the calendar years 1918 and 1919.

There were two questions involved in the trial Court:

1. Is the petitioner entitled to deduct from its income for the calendar years 1918 and 1919 amounts representing obsolescence of tangible assets?

2. Is petitioner entitled to deduct from its income for said calendar years amounts representing obsolescence of intangible assets?

The District Court found that if either deduction was allowed the petitioner, it would have no net income subject to tax; it thereupon allowed both deductions and entered judgment for the petitioner. The Second Circuit Court of Appeals reversed the District Court with respect to both deductions, holding on the authority of *Clarke vs. Haberle Crystal Springs Brewing Company*, 280 U. S. 384, that obsolescence on account of prohibition legislation was not allowable on either tangible or intangible assets.

This petition seeks review of the question only with respect to tangible assets. That question is now before the Court in *Lucas vs. Niagara Falls Brewing Company*, No. 61, this Term, on writ of certiorari granted April 28, 1930, to the Second Circuit Court of Appeals which, prior to the decision in the instant case, had allowed obsolescence on tangible assets of a brewery under similar circumstances. *Niagara*

Falls Brewing Company v. Commissioner, 38 Fed. (2d) 217.

The same question is also pending before this Court in *Lucas vs. National Industrial Alcohol Company, Inc.,* No. 109, this Term, on writ of certiorari granted June 2, 1930, to the District of Columbia Court of Appeals, which allowed a deduction from income of the loss in value of a brewery building resulting from prohibition legislation. (38 Fed. (2d) 718)

More specifically stated, the question here presented is as follows:

Is petitioner entitled to a deduction from its income for obsolescence of its brewery buildings, plant and equipment, which became valueless with the advent of prohibition, such deduction being claimed under Section 234 (a), sub-divisions 4 and 7 of the Revenue Act of 1918 (c. 18, 40 Stat. 1077), which allows corporations, subject to tax, in computing their net income to deduct "(4) losses sustained during the taxable year and not compensated for by insurance or otherwise * * * (7) a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence * * *."

The petitioner from the year 1879 and until October 20, 1919, was engaged in the business of manufacturing and selling beers, ales and porter, for which purpose it erected buildings in the Borough of Manhattan, City of New York, and installed the necessary machinery and equipment (R. 39). Petitioner duly filed its final income tax return for the calendar year 1918 on June 5, 1919, paying a tax in the sum of $1,339.13, as therein shown to be due (R. 36). Dur-

ing the year 1924, an additional assessment in the sum of $6,847.43 was levied against the petitioner on account of income and profits taxes for said calendar year. The said amount was paid by the respondent crediting against such additional assessment certain sums of money which the respondent had certified were over-assessed for the years 1913 to 1917, inclusive, and 1920, making a total of $2,720.58 (R. 36). The balance of $4,126.85 was paid by the petitioner under protest on June 13, 1924 (R. 37).

Petitioner duly filed its final income tax return for the calendar year 1919 on June 15, 1920 (R. 38), paying the tax therein shown to be due, amounting to $1,008.42 (R. 38). During the year 1924 an additional assessment in the sum of $10,171.41 for the year 1919 was levied against petitioner and after notice and demand the money was paid under protest on June 13, 1924 (R. 38).

The petitioner thereafter duly filed claims for refund totaling $8,186.56 for taxes paid for the calendar year 1918, and totaling $11,179.83 for taxes paid for the calendar year 1919, both based upon the claim that it was entitled to a deduction from its gross income of a reasonable allowance for obsolescence on its buildings, plant, equipment and intangible property. Said claims for refund were rejected by the Commissioner of Internal Revenue (R. 37, 38.)

An action was subsequently instituted in the District Court of the United States for the Southern District of New York for the recovery of all taxes paid for the calendar years 1918 and 1919. The District Court gave judgment to the petitioner for the full amount of the taxes paid for said calendar years and found as a fact, on uncontradicted testimony, that on

January 31, 1918, the beginning of the obsolescence period, the depreciated cost of petitioner's buildings was the sum of $153,932.18 (R. 39); that said buildings were constructed especially for the purpose of manufacturing, selling and delivering beers, ales and porter and were not commercially adaptable for any other use (R. 39); that on January 16, 1920 (the end of the obsolescence period) said buildings had no salvage value (R. 40); that as a result of prohibition and beginning on January 31, 1918, and ending January 16, 1920, the petitioner suffered a loss by obsolescence of its buildings equal to the total depreciated cost thereof, to wit: $153,932.18 (R. 40); and that over the obsolescence period, to wit: January 31, 1918, to January 16, 1920 (R. 40) such loss should be ratably apportioned. The Court further found that if a deduction was allowed for obsolescence of either tangibles or intangibles, the petitioner would have no net income subject to tax for either the year 1918 or 1919 (R. 40).

The Circuit Court of Appeals, although it had previously expressed a contrary view (*Niagara Falls Brewing Co. vs. Commissioner*, 38 Fed. (2d) 217) felt constrained to reverse the judgment below on the authority of *Clarke vs. Haberle Crystal Springs Brewing Co.*, 280 U. S. 384, the Court declaring in its opinion (R. 311) that the opinion of this Court in that case permitted of no distinction between tangibles and intangibles.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The question, whether petitioner should be allowed a reasonable deduction for obsolescence of its brewery building, plant and equipment, is now before this Court in the cases of *Lucas v. Niagara Falls Brewing Co.* No. 61, and *Lucas v. National Industrial Alcohol Co.*, No. 109, in which writs of certiorari were granted on April 28, 1930, and June 2, 1930, respectively.

2. Prior to the decision in the instant case, a deduction for obsolescence of tangibles was uniformly allowed by the Courts and by the United States Board of Tax Appeals.

3. The *Haberle Crystal Springs Brewing Co.* case *supra*, is clearly distinguishable from the instant case. In the *Haberle* case, it was held that no deduction could be allowed for obsolescence of the *good will* of a business which Congress had declared to be noxious. The decision turned upon whether the Statute included such an asset. Obsolescence of tangible assets is provided for in unmistakable terms.

4. The Circuit Court of Appeals erred in modifying the judgment of the District Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case, numbered

and entitled on its docket No. 236/1930, V. Loewers Gambrinus Brewery Co. against Charles W. Anderson, individually and as Collector of Internal Revenue of the United States, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court and that this petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

V. LOEWERS GAMBRINUS BREWERY CO.
By ARTHUR B. HYMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The District Court did not render an opinion, other then the findings (R. 35-42) and the judgment (R. 54-55) which have not been reported. The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on May 19, 1930, and is not yet reported. It is to be found on page 311 of the Record herein.

II.

JURISDICTION.

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stats. 938; U. S. C. Title 28, Sec. 347).

2. The judgment sought to be reviewed was entered May 26, 1930 (R. 313).

3. Suit in which the judgment sought to be reviewed was rendered was brought in the District Court of the United States for the Southern District of New York to recover income and profits taxes alleged to have been erroneously collected (R. 4). Judgment was there rendered for petitioner (R. 54) and respondent appealed to the Circuit Court of Appeals for the Second Circuit (R. 304) which Court reversed the judgment of the District Court and remanded the case with directions to dismiss the complaint (R. 313). Upon motion the mandate of the Circuit Court of Appeals was amended by inserting a provision for

judgment in favor of the petitioner in the sum of $4,126.85 which amount was collected by the Commissioner of Internal Revenue after the Statute of Limitations had run (R. 313).

4. Cases believed to sustain the jurisdiction are:

Haberle Crystal Springs Brewing Co. vs. Clarke 280 U. S. 384
Lucas vs. Alexander, 279 U. S. 573
Hellmich vs. Hellman, 276 U. S. 233.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity is not repeated.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified under heading "B" in the petition and in the interest of brevity are not repeated.

V.

ARGUMENT.

Obsolescence of Tangible Assets.

The Circuit Court of Appeals erred as a matter of law in interpreting the decision of this Court in *Clarke vs. Haberle Crystal Springs Brewing Co.*, 280 U. S. 384, to mean that no allowance for obsolescence of tangible property is permissible under Section 234 (a), subdivisions 4 and 7, of the Revenue Act of

1918. The right to a deduction for obsolescence of *good will* only was involved in the *Clarke* case and only that was determined. What was said concerning the destruction of a noxious business has no application to the destruction of tangible assets. Specific provision is made in the Statute for obsolescence of tangible assets and the propriety of such allowance has never been denied.

Niagara Falls Brewing Co. vs. Comr., 38 Fed. (2d) 217
Redwing Malting Co. vs. Willcutts, 15 Fed. (2d) 626. Certiorari Denied, 273 U. S. 763.
Appeal of Manhattan Brewing Co., 6 B. T. A. 952
Appeal of Mary Dowling, 6 B. T. A. 976
Appeal of Star Brewing Co., 7 B. T. A. 377
Appeal of George Wiedemann Brewing Co., 9 B. T. A. 792
Renziehausen vs. Commissioner, 31 Fed. (2d) 675. Aff. 280 U. S. 387.

There is no specific provision in the Statute for allowance of obsolescence of intangible assets and this Court refused to read it into the statute in the *Haberle* case, *supra*. No other question was before the Court and therefore its opinion must be considered as only applicable to the point involved. It cannot be construed as indicating an intention to nullify the plain purport of this statute.

If this Court should sustain the Circuit Court of Appeals in *Niagara Falls Brewing Co. vs. Commissioner, supra*, now before it on certiorari, the petitioner will, of course, be entitled to reversal and to the affirmance of the judgment of the District Court, regardless of whether it is entitled to an allowance for obsolescence of intangible assets.

Certiorari having been granted in the *Niagara Falls Brewing Co.*, and in the *National Industrial Alcohol Co.* cases, it should also be allowed in the instant case which involves the same point. Its refusal would, of course, leave the petitioner helpless.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the correct construction of the statutory provisions relating to allowance of obsolescence as a deduction from income may be definitely settled and that the error in the construction and application of such statutory provisions in this case may be corrected; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals of the Second Circuit and finally reverse it.

Respectfully submitted,

ARTHUR B. HYMAN,
KARL D. LOOS,
Counsel for Petitioner.

Washington, D. C.,
August 8, 1930.